THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 06.09.2007

\+ **CS (OS) 1205/2006**

M/S LACHHMAN DAS BEHARI LAL ...Plaintiff

- versus -

SHRI GHANSHYAM DAS JETHA NAND & OTHERS ...Defendants

Advocates who appeared in this case:
For the Plaintiff : Mr M.R. Bhalerao.
Defendants : Ex parte

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment? YES

2. To be referred to the Reporter or not? YES

3. Whether the judgment should be reported in Digest? YES

BADAR DURREZ AHMED, J (ORAL)

1. The plaintiff has filed this suit for permanent injunction, infringement of copyright / trademark, passing off and rendition of accounts etc. The defendants have been proceeded ex parte. The plaintiff has filed its evidence in the shape of affidavits of PW1 to PW12. The plaintiff has also filed documents which have been marked as exhibits PW1/1 to PW1/13. The document at page 51 filed on behalf of the plaintiff as Annexure – VIII contains the plaintiff's mark as well as the defendants' mark. The plaintiff's mark is marked as exhibit-A. The defendants' mark is marked as exhibit-B. The

document at page 52 (Annexure – IX) which is a bill issued by the defendant No.3 is marked as exhibit-C.

2. The plaintiff is a registered partnership firm which was constituted in 1925. Later, in 1981, due to expansion of the business, the plaintiff moved a part of its business activities as well as its head office to Delhi. The plaintiff firm is in the business of manufacturing and selling snuff through its licencees. Shri Manohar Lal Wadhwa (PW-1) is one of the partners in the firm and he has given his affidavit by way of evidence. The affidavit filed by PW1 reiterates and substantiates the contents of the plaint. Exhibit PW1/1 is a certified copy of the registration of the firm. Exhibit PW1/2 is a certified copy of the trademark registration of the mark SWAMI. The registration number is 301792. It is registered in Class 34 and is effective from 28.12.1974 for the sale of snuff in the States of Punjab, Rajasthan, Madhya Pradesh, Uttar Pradesh, Maharashtra, West Bengal, Haryana, Andhra Pradesh, Orissa, Assam, Sikkim, Bhutan and Nagaland. A certified copy of the copyright registration in respect of the plaintiff's SWAMI Label has also been filed and the same is exhibited as exhibit PW1/3. The label of the plaintiff is indicated in Exhibit-A and that of the defendant Nos 1 and 2 is indicated in Exhibit B. The defendant No.3 is the person through whom the goods of defendant Nos 1 and 2 are sold. Since the defendants have chosen not to appear, the evidence filed on behalf of the plaintiff has gone uncontroverted.

3. The main question that needs to be examined in the present case is whether the defendants' mark (Exhibit B) is deceptively similar to the plaintiff's mark (Exhibit A). The defendant Nos 1 and 2 were earlier manufacturing and selling their products under the mark SWAMI. However, subsequently they have changed it to SNUFF. A look at the two exhibits – Exhibit A and Exhibit B would clearly indicate that Exhibit B is deceptively similar to Exhibit A. If the two exhibits are looked at separately and not side by side then the similarity and deceptiveness become even stronger. Accordingly, I hold that the defendants' label which is represented in Exhibit B is deceptively similar to the plaintiff's label which is represented in Exhibit A. It may also be noted that the colour scheme[1] that has been employed by the defendants is virtually identical to the colour scheme employed by the plaintiff. Taking into account the class of purchasers who purchase snuff would also aggravate the situation further inasmuch as they would not be so discerning as to the mark the minute differences which have been introduced by the defendants in their label. An examination of the entire case reveals that the defendants have copied the label of the plaintiff entirely and have cleverly sought to introduce minor differences which would not be noticed by the class of purchasers who normally purchase such goods. Accordingly, in my view the plaintiff is entitled to a decree of injunction.

1 As to placement of trade mark in a distinctive colour combination being entitled to protection in a passing off action see: Colgate Palmolive Co. v. Mr Patel: 2006 (II) AD (Delhi) 89.

4. With regard to the question of damages, the learned counsel for the plaintiff submitted with reference to the affidavits of PW5, PW6, PW7, PW8 and PW9 that the plaintiff has suffered substantial losses on account of the defendants' aforesaid activities. For example, it has been stated by PW5 that it is carrying on the business of general merchants under the name and style of M/s Mahesh Traders at Jabalpur. The said PW5 (Pavan Bashani) has stated that his firm regularly purchases and sells SWAMI snuff of the plaintiff firm and for the years 2004, 2005 and 2006 his purchases have been to the extent of Rs 1.48 crores, Rs 1.40 crores and Rs 1.51 crores. It has also been stated that SWAMI snuff of the plaintiff is in great demand. It has been stated in paragraph 3 of the affidavit that his sale of SWAMI snuff would have been much more than the existing sale, had the infringing and / or deceptively similar trademark of the defendants not been introduced. He has stated that this has caused a loss of sale of Rs 10 lacs. Similar affidavits have been given by PW6, PW7, PW8 and PW9. According to PW6, the loss is to the tune of Rs 15 lacs per annum. PW7 says that the loss is to the extent of Rs 10 lacs and PW8 also says that the loss is to the extent of Rs 10 lacs. PW9 has stated that the loss was to the extent of Rs 10 lacs per annum.

5. As against this, PW1 in his evidence affidavit has stated in paragraph 15 that 80% of the plaintiff's sale pertains to the SWAMI trademark

label. The year-wise sale figures for 1995-96 right up to 2005-2006 have been indicated in the said paragraph. The sale in 1995-96 for SWAMI Snuff was approximately Rs 7.74 crores. It rose continuously till 1999-2000 when the sale was approximately Rs 10.97 crores. For the year 2000-2001, the sales dropped by approximately Rs 90 lacs as the sale figures were of Rs 10.06 crores. The sale increased in 2001-2002 to Rs 11.31 crores and made a further drop of Rs 10 lacs in 2002-2003 when the sales were of approximately Rs. 11.21 crores. Thereafter, the sales figure continuously increased to 2005-2006 when the sales amounted to Rs 12.90 crores. From the aforesaid, it is apparent that although there are statements of PW5 to PW9 indicating loss of sales on account of the activities of the defendants, there is no evidence of a matched decrease in the sales of the plaintiff. Insofar as the exact quantities are concerned, there is no doubt that there has been drop in the sales to the extent of Rs.90 lacs in 2000-2001 and a drop of Rs 10 lacs in 2002-2003. There is no other evidence available of there being a drop in sales. It may well be that had the activities of the defendants not taken place, the increase in the sales might have been more but there is no conclusive evidence as to the exact quantum of the loss that has been caused to the plaintiff. There is ample evidence however of the fact that loss had been caused to the plaintiff by the defendants. At the time of the filing of the suit, the plaintiff had estimated the damage caused by the defendants' activities to be Rs 20,00,100/-. In paragraph 36 of the plaint, it is stated that the

plaintiff estimates that such amount would be found due to the plaintiff when accounts are rendered by the defendants.

6. Considering all the facts and circumstances of the case and the evidence that is on record, I do feel that the quantum of loss that has been occasioned by the defendants' infringing activities would be greater than what was initially estimated by the plaintiff. However, it would also not be to the extent that the plaintiff now indicates in the affidavits filed on its behalf. In my view, it could be reasonably estimated to have lost to the extent of Rs 25 lakhs on account of the defendants' activities. But the matter does not rest here. As observed in ***The Himalaya Drug Company v. Sumit*****: 126 (2006) DLT 23**, apart from compensatory damages, in cases of infringement of trade marks, copyrights, etc., courts should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realise that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them. These observations were made on the basis of certain other decisions, namely, ***Time Incorporated v. Lokesh Srivastava and Another:*** **116 (2005) DLT 599** and ***Mathias v. Accor Economy Lodging*** reported in **347 F.3d 672 (7th Cir. 2003)**. In the case of ***Himalaya Drug Company*** *(supra)*, punitive damages, equivalent to compensatory

damages were awarded. Accordingly, adopting the same principle, the plaintiff would be entitled to an additional sum of Rs 25 lakhs from the defendants by way of punitive damages.

7. The suit is decreed in terms of prayers (a), (b), (c) and (d) as contained in paragraph 37 of the plaint. In lieu of the prayers of rendition of accounts as contained in prayer (e), the plaintiff is entitled to a decree for Rs 25 lakhs by way of compensatory damages as well as a decree in the sum of Rs 25 lakhs on account of punitive / exemplary damages in the plaintiff's favour and against the defendants. The plaintiff is also entitled to costs. The damages awarded shall be payable by the defendants jointly and severally and shall carry interest @ 9% per annum from the date of decree till the date of payment. The suit stands decreed accordingly. Before the formal decree is drawn up, the balance court fee shall be paid by the plaintiff.

BADAR DURREZ AHMED
(JUDGE)

September 06, 2007
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